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Address of Honorable Richard Olney, Formerly Secretary of State

on

General Arbitration Treaties.

It is undoubtedly desirable, in the interest of the arbitration of international controversies, that at the next Hague Conference a form of treaty should be presented which, while covering all differences between states, shall steer clear of the difficulties which in the past have wrecked important treaties of that character. It is a matter in which the United States may be expected to lead, having by precept and example so often distinguished itself as a pioneer in movements tending to do away with war between nations. Facts must be looked in the face, however, and it is apparent that the present position of the United States with reference to this subject is not so advantageous as could be wished. No two countries of the world are so favorably situated for the purposes of an arbitration treaty between them inclusive of all differences as are Great Britain and the United States. Through racial, social, and commercial ties ever knitting them closely together, war between them has become almost unthinkable. Yet two trials for such a comprehensive treaty have failed and the official position of the United States today seems to be that there is a class of questions which is necessarily to be excluded from any general arbitration treaty. The class covers controversies described as affecting "the vital interests, the independence, or the honor" of the parties. In the English-American treaty of 1897 such controversies were disposed of by sending them to arbitration, but so constituting the arbitral court that an award must have the assent of the representatives of the losing party or of a majority of them. In the treaty of 1911 it was sought to meet the difficulty by a joint commission of inquiry empowered to investigate and decide whether a question was or was not arbitrable and should or should not be arbitrated. But neither plan proved to be acceptable to the United States acting under the treaty-making power vested jointly in the President and Senate.

Nothwithstanding past failures, it is not believed that the United States should be deemed to be irrevocably committed to the position that it will make no general arbitration treaty which does not exclude from its operation what are claimed to be non-arbitrable questions as above defined. Neither is there any controlling reason why its repre-

sentatives at the next Hague Conference may not propose a draft of treaty between nations which shall be so framed as to minimize if not remove the objections to making all controversies at least prima facie arbitrable. Such a draft would, of course, be without the official endorsement of the United States Government. But it could be assumed to have the sympathetic endorsement of the American people, who are believed to have strongly favored the efforts of three Presidents to make an English-American treaty from which no subject of difference should be excepted. A draft treaty of that character presented by our representatives at The Hague would be received not only with respect, but with great interest; would be discussed in all its aspects with earnestness and ability; and, if generally approved, could be urged upon the United States Government as something to be adopted and used in a renewed effort to substitute arbitration for war as the means of settling international disputes.

In considering the feasibility of such a draft treaty, it may not be wholly superfluous to note that matters of national policy, domestic or foreign, are universally conceded to be outside the category of arbitrable questions. Thus, the right of every independent state to determine for itself what persons and what property shall have access to its territory, or with what other state or states it will form amicable relations for mutual advantage, can not be drawn in question by any other state. It is to be assumed also for present purposes that the discussion deals not with weak states which can not defend themselves against aggression either directly, or indirectly through alliances, but with states entirely competent to protect themselves from spoliation or outrage. No such state, it is claimed, should or will litigate its honor, its independence, or its vital interests. If that be admitted, two difficulties is connection with the making of a comprehensive arbitration treaty at once present themselves. One is that what differences will touch honor, independence, and vital interests can not possibly be defined in advance, and that, even after a difference has actually arisen, its nature as being of the arbitrable or non-arbitrable class can hardly fail to be matter of real doubt and debate. The other difficulty is that, whether an actual difference touches its honor, independence, or vital interests every nation, it is urged, must decide for itself and can not consent to have determined in any other way. The practical problem, therefore, is how to lessen the force of these obstacles and upon what lines an arbitration treaty between nations may be so constructed as,

while recognizing the obstacles and not denying them any legitimate operation, shall yet be the nearest possible approach to a treaty covering all differences.

It will conduce to that result, it is believed, if such a treaty shall expressly declare that all differences between the contracting parties of whatever character, unless adjusted by diplomacy, shall be settled by arbitration, and that whenever a difference not so adjustable presents itself, the parties shall immediately proceed to set in motion the designated machinery by which the arbitration is to be made effective. The mere existence of such a treaty will have a desirable moral effect upon the governments and peoples of both the parties. It will accustom them to consider arbitration as the normal mode of settling their difficulties and to look upon any other mode as unusual and extraordinary and as justifiable only by some great and exceptional emergency.

It will also conduce to the same result, by removing the objections already stated, if such a treaty, after making all differences arbitrable, shall then reserve to the legislature of either of the contracting parties the right and the opportunity to withdraw a particular subject-matter from arbitration by a declaration that it concerns its honor, independence, or vital interests. In this connection, the modern organization of the governments of the great states of the world is to be noted. On the one hand, the principle of democracy is so far accepted and so far controls that the legislative power is exercised by representatives chosen, theoretically even if imperfectly in practice, by the free suffrages of the people. On the other hand, the treaty-making power, together with the measures and proceedings incident to its execution, is practically vested in the executive branch of the government. It is that branch which, under a treaty excluding the supposed non-arbitrable class of questions, would decide whether a difference was within that class, and, if deciding that it was, would block arbitration. Under the all-inclusive form of treaty now proposed, however, arbitration will go forward in the regular prescribed course unless arrested by the action of the legislative branch of one of the governments concerned. It is that branch which will decide against arbitration if it is prevented, and which will assume the responsibility of such decision, as it properly should for obvious reasons.

The national legislature is the best representative of the people of a country and is the most closely in touch with the sentiments, views, and interests of its people.

The direct representatives of the people should take the responsibility of a decision which may lead to war because it is by the people that the losses and sufferings of war are to be borne.

The executive administration of a nation as the agent of its dominant party may easily be influenced by motives of a secret and personal nature; may conceive party success to be identical with national honor, independence, or vital interests; and is only too likely to proceed without that thorough enlightenment which is only possible when the discussion of a measure is by party opponents as well as by party friends.

When a national legislature, on the other hand, is confronted with the alternative of risking or making war, or of permitting arbitration of a difference with another nation to take its appointed course, there will necessarily ensue such investigation, discussion and deliberation as will bring out the merits of the dispute in all its aspects and will enable the dictates of genuine patriotism and sound policy to exert their legitimate influence.

In short, to refer the decision of such an issue to a national legislature ensures bringing into play two forces of prime importance in the interest of peace—to wit, full publicity of all material facts and considerations, and sufficient time for reason to become the deciding factor in the result.

By reason of the solidarity of modern civilized states, public opinion as manifested not only in those directly concerned but in all is sure to act with enormous force whenever war between any of them is seriously threatened.

When Earl Russell, speaking for the government of the day, characterized the American proposition to arbitrate the so-called "Alabama Claims" as inconsistent with the honor and dignity of the British throne and people, the door seemed to be finally closed upon any pacific settlement. It was reopened later by the pressure of public opinion, which had been given time to crystallize, which discovered that there was a real wrong to be redressed, and which led the British Government to seek and find a way to arbitrate the claims without prejudice to honor or substantial interests.

A similar case was presented and a similar result followed in respect of the boundary controversy between Venezuela and British Guiana, which was at first claimed to be impossible of arbitration by reason of the rights and equities of British settlers.

These instances are striking examples of time and publicity and an

ensuing educated public opinion as potent preventives of war. It is a conspicuous merit of such an all-inclusive arbitration treaty as that under consideration that, while in and of itself a constant influence for peace, legislative interference with it can not take place without giving such preventives their fullest operation.

It remains to note that it is possible for the legislative branch of a government as well as the executive to go astray and to be misled into declaring an arbitrable difference to involve honor, independence, or vital interests. But such a declaration is not a finality and may be revoked by legislators of their own motion or through the influence of their constituencies. Further, if such a declaration brings war in sight, it also compels investigating the preparedness for war, comparing the warlike resources of the parties, and counting the cost generally—considerations of a most sobering as well as persuasive character. Here again the solidarity of modern states operates as a strong conservator of peace. The length of the purse rather than of the sword now determines the fortunes of war, and the most bellicose of great Powers can not but be staggered by the prospect of disrupting the closely interlocked relations, pecuniary and commercial, between its own country and the country to be assailed. In no quarter will the widespread ruin of such a disruption be more keenly appreciated than by the legislature of a country, intimately and practically acquainted as it must be with its industries and business interests—in no quarter is there likely to be more zealous effort to preserve "peace with honor." Nevertheless, when all is said, until the millennium arrives, the possibility of war is not to be wholly eliminated. Treaties of arbitration and all the other pacific instrumentalities the wit of man can devise can do no more than to make the possibility as remote as is humanly practicable.

[The Chairman announced the following committees:

Auditing Committee: Messrs. W. C. Dennis and A. H. Snow.

Nominating Committee: Professor C. N. Gregory, Mr. McKenney, Mr. Marburg, Rear-Admiral Stockton, and Mr. Wheless.]

The CHAIRMAN. Gentlemen, the papers to which you have listened are now open for discussion.

Mr. JACKSON H. RALSTON. The Senator's experience in connection

with international matters is such as to command for him respectful attention to whatever he says, and that we most cheerfully accord. Yet I must think that in many regards his argument is singularly inconclusive and incomplete.

Before addressing myself to what I want to say in regard to the address proper, permit be to allude to one or two expressions which I think deserve our consideration even momentarily, and deserve large consideration in the final outcome of the general subject we have in mind.

Senator Turner in one connection says that war is a necessary evil. Now, we have to bear in mind that war is a thing of human origin and under human control. If that be so, I must deny the statement, oft repeated, that war is a necessary evil, for a thing which can be controlled and which ought to be controlled, and which is human in its origin, is not a necessary evil. War is an evil which under certain circumstances it may be difficult to escape from. That it is a necessary evil I particularly deny.

Senator Turner says very decidedly that it is international law that a conquering nation may exact whatever it will from the nation conquered, and that that is recognized by the law writers. Mr. President. I am going to take the liberty of denying that. I will agree, and we must agree that many international law writers have said just that thing, and we must agree that in works of international law, what is called law is laid down as stated by Mr. Turner. But let us consider the naked facts. Suppose a writer on criminal law were to say that he has noticed that whenever the robber overcame the person robbed, he took away from him whatever he choose of his possessions. And suppose he said that there were a hundred different instances of that kind, and he enumerated them one after another in his book on criminal law. Would there then be a law of robbery, because those distinct, isolated facts had been enumerated within the pages of a textbook relating to criminal law?

I take it that the term "law" is a term of grand application, that it has no application to robbery, and that it has no application to the distinct and separate several events which occur when conquering nations possess themselves of the goods of conquered nations. In order that there should be law, there must be running through them all a common principle to which men can with safety appeal, and that principle must have a philisophical or an ethical foundation, and in the absence

of that philosophical or ethical foundation there is no law. There is simply gathered together a bundle of disjointed facts. Now that appears to me to be the truth with regard to that thing which Senator Turner states to be international law. It is not international law, even though it be so proclaimed, and it never will be international law, because it is not founded upon any ascertainable basis of right.

But what I have said so far is in a way apart from the argument, and yet it seems to me proper to say it, at least by way of suggestion, because these things have to be thought out and straightened out, and there must be straight thinking on international law before we arrive at straight conclusions as to what is or is not law, and before we regard as law repeated facts which are not law.

Senator Turner believes that four classes of things should be reserved from international arbitration. The first of these is the independence of the contracting parties. Now I am prepared to accept the view that independence is not an arbitrable subject; and to put that in an arbitral treaty, although it has been done, and done more than once, is putting in words which under the circumstances are absolutely meaningless. If we put in an arbitral treaty the statement that we will discuss and settle by way of arbitration between ourselves all disputes except those which relate to the independence of the several parties, although that has been done, and I speak with due respect to those who have done it, we are doing an aimless thing. The very hypothesis upon which arbitration rests, upon which treaties of arbitration rest between nations, the very hypothesis of it is the independence and the equality of the two parties, and to iterate it becomes absolutely without meaning. So we may dismiss the item with this statement.

Mr. Turner next suggests that the nature of the body politic is not arbitral and should be excepted from treaties of arbitration. Of course, it is not the subject of arbitration, for the very reason that it offers no international question. Why should you put into a treaty a limitation upon the action of an arbitral court as to a thing which is in its nature not international? To put it in is once more a waste of words and a confusion.

Again he says that arbitration must not relate to the exercise of domestic powers. Of course it must not, and never has. And why should that be in a treaty? The placing of it in a treaty or the imposition of that as a limitation upon arbitration is as purely a work of

supererogation as well could be. The very language shows it. You are dealing with international arbitration. Therefore why should it relate to the exercise of domestic powers? So I say that this point has no relation whatever to treaties.

Take the fourth point, matters of foreign policy deemed by the state to be necessary to safeguard either its independence or its domestic institutions. The argument under this head would be so long that I could not enter into it. I only want to make a few observations. It is noteworthy that in support of that proposition Senator Turner refers to the Monroe Doctrine and its several applications, down even to its application in the case of Venezuela. Now, if we think a moment we will see that, under this language, a difficulty arising with relation to the Monroe Doctrine, supposing it to arise, would be arbitrable, although Senator Turner relies upon this language to put it beyond the reach of arbitration.

"Matters of foreign policy deemed by the state to be necessary to safeguard either its independence or its domestic institutions." Now who ever supposed for a moment that the United States considered the action taken by President Cleveland and Secretary Olney in the Venezuelan matter as taken to safeguard either the independence of the United States or the domestic institutions of the United States? I say it was taken for the purpose of giving voice to an American sentiment, which by the way was not dependent at all upon the Monroe Doctrine, because it was the sentiment of fair play which existed in this country, and did not have to find its inspiration in anything other than the hearts and consciences of the people. So I say that under the very proposition of Senator Turner the Monroe Doctrine could be a subject of arbitration.

But that does not reach the question which I have not the time to go into, because as I said, the argument would be too long. It raises up the whole question whether there is any national dispute whatever which should be reserved from arbitration. I submit that from my point of view no dispute in which the United States is or can be concerned should be reserved from arbitration. The United States is great enough not to do wrong. It is great enough to accept the challenge when any nation says it has done wrong, and to submit its action to the arbitrament of competent men. And we could do no better than to have the power of arbitral treaties just that strong, and present ourselves freely and openly to the world with our case,

whatever it may be. We have no need of the Monroe Doctrine to defend our independence or our institutions. It is only about the Monroe Doctrine that it is suggested that we ought not to submit all propositions to arbitration, at least under this heading. The Monroe Doctrine today is a sentiment and not a matter of public policy with the United States. It becomes merely, as I say, the expression of a sentiment, but it is the expression of a sentiment against which, in the present state of civilization, with a sufficient number of arbitral treaties throughout the world, the world will not resist.

Mr. THEODORE MARBURG. Mr. President and Gentlemen, I listened with delight to the stimulating paper of Senator Turner, and feel that we are greatly indebted to Dr. Kirchwey for the agreeable and pleasing delivery of it.

Instead of being an argument against the treaty of August 3, 1911, with Great Britain (the treaty with France being in the same terms), to my mind Senator Turner's paper is an argument for it.

Senator Turner very properly says that the important thing is not that all questions should be arbitrated, but that all questions should be settled peaceably.

Now what does the treaty, even as amended, do? At the outset I should say, differing a little from Mr. Ralston, that arbitration is in its nature a judicial process, and that it should concern itself principally, if not exclusively, with questions of law. The treaty as amended provides in its preamble that we shall settle all questions peaceably, and it is a treaty, remember, between two great self-respecting countries. It is not a treaty between a progressive country and a backward country, or between two backward countries who are unwilling or unable to carry out their promises, but it is a treaty between countries that have traditions of honor and self-respect, traditions of living up to their promises. The preamble says that all questions shall be settled peaceably.

Senator Turner refers to disputes of fact. Now our treaty, even as amended, takes care of his demand there. It sets up a commission of inquiry. He points to the Hague commission of inquiry, intimating that it is superior to the commission of inquiry set up under this treaty. The Hague commission of inquiry is superior only to one form of commission of inquiry that may be set up under this treaty. You will recall the language of the treaty: it provides that this commission of inquiry shall be composed equally of nationals

of the two countries, or that it "may be otherwise constituted." Now certainly the fact that the Hague commission of inquiry is constituted with only one national of each country upon it, and a majority of non-nationals, makes it superior to the form of commission as constituted under the first alternative of the treaty of August 3. But under the second alternative of that treaty, the provision that the commission "may be otherwise constituted," it is possible to form a commission composed entirely of non-nationals. No one can listen to a discussion of the subject of nationals and non-nationals upon commissions of inquiry and upon arbitration tribunals without soon reaching the conclusion that the ideal and desirable thing is a commission composed entirely of non-nationals, something more advanced than the Hague commission of inquiry, which contains two nationals; and I believe that, in the course of time and under the pressure of public opinion, even our United States Senate can be led to that high position.

The second category of disputes which Senator Turner treats are those relating to questions of law. The treaty provides that justiciable questions, that is, questions which can be interpreted by the rules of law or equity, shall be referred to arbitration. Arbitration is therefore considered by the treaty to be a judicial process, only justiciable questions being so referred.

The reference is to the Permanent Court of Arbitration, or to an arbitral tribunal which may be specially constituted if necessary. I am revealing no confidence when I state that the President of the United States and the Secretary of State both say that the term "a court of arbitral justice" is put in there with a view of making use of the Court of Arbitral Justice which was accepted in principle by the Second Hague Conference, a court which shall be a true court of justice. Now, when this court shall have come into being and shall have won the confidence of the world, all questions under Article I of the treaty—justiciable questions—will naturally be referred to it. To set up new institutions as substitutes for war is one thing. To get the nations to use them is quite another. The advantage of this clause of the treaty is that it provides cases for the court and will set it going promptly.

Then, you have the third category to which Senator Turner refers, questions of national honor. The treaty by its preamble provides for settling such cases. It states that questions involving law shall be determined by arbitration, regarding arbitration as a judicial process.

It states that all questions shall be settled peaceably. Does it not therefore provide for just what Senator Turner stipulates, the submission of great questions of national policy to some other tribunal? Can we not under this treaty submit such questions to a commission of inquiry or to mediation? Can we not resort to any other form of settling international controversies, which is accepted today, or devise new forms, if necessary? The important thing is that, as the treaty provides, these two great, self-respecting nations shall settle all controversies peaceably.

Now the Senate stipulated that the treaty should not be so interpreted as to compel the submission to arbitration of certain specified questions, namely those relating to the admission of aliens to this country and to our schools, those relating to the money obligations of States, to territorial integrity, and to public policy.

When the Senate excepted those questions from arbitration it did not, however, relieve the contracting countries of the binding force of the preamble, the obligation to settle those very questions peaceably. Therefore I maintain that the treaty, even as amended, meets entirely the conditions laid down by Senator Turner.

Mr. DENNIS. As I understood Senator Turner's most interesting paper, he makes the suggestion that the word "equity," or perhaps the phrase "law or equity," in the recent arbitration treaties with England and France would give to the joint high commission powers somewhat resembling those of the English Chancellor in the days when the Chancellor's power was supposed to vary in proportion to the length of the Chancellor's foot.

Now, with all deference for Senator Turner and for other eminent men who have made substantially the same suggestion, I do not believe that this proposition is tenable in view of the international practice for the last one hundred years and, particularly, in view of certain decisions by arbitral tribunals. The words "justice and equity" are not new. They are as old as arbitration itself. From the Jay treaty of 1794, which ushered in the modern era of international arbitration, to the Prize Court Convention to which the Senate has but lately given its advice and consent, these words have been employed again and again in the arbitration treaties of the United States.[1]

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[1]The following chronological list of arbitration treaties of the United States

Ordinarily the words appear to have been readily understood. Sometimes, however, it has been attempted to make the point that under cover of the word "equity" the court was empowered to exercise arbitrary power, that the court was entitled to decide "according to the conscience of the arbitrator," whatever that might mean.

I think I am safe in saying that every time that suggestion has been made it has been negatived by the tribunal. The point was taken in one case before the American and British Claims Commission which passed upon claims arising during the Civil War and, in a very interesting opinion, Mr. Commissioner Frazier, the United States commissioner, held that the point was not well taken. In 1903, as you all know, a number of the nations entered into arbitration protocols with Venezuela in substantially identical terms. By the terms of these protocols the arbitrators were empowered to decide in accordance with "absolute equity, without regard to objections of a technical nature or of the provisions of local legislation." The umpire of the American-Venezuelan Commission did rule, in certain cases, as if he thought these words actually gave him unrestrained liberty to decide one way in one case and another in another, according to his individual conscience or idiosyncrasy without any particular reference to consistency or to recognized rules of law. When one of

using the expression "justice and equity" or its equivalent makes no pretense of being complete: Great Britain, Treaty of Amity, Commerce and Navigation (Jay Treaty), November 19, 1794, Article VI; Great Britain, Convention Respecting Fisheries, Boundary and the Restoration of Slaves, October 20, 1818; Great Britain, Claims Convention, February 8, 1853; Costa Rica, Claims Convention, July 2, 1860; Great Britain, treaty for settlement of claims with the Hudson's Bay Co., etc., July 1, 1863; Great Britain, Treaty of Washington, May 8, 1871, Article XII (Claims arising during the Civil War aside from the Alabama Claims). The following treaties or conventions use language the same or substantially the same as the Seventh Article of the Jay Treaty with Great Britain which reads, "according to the merits of the several cases and to justice, equity, and the laws of nations": Spain, Treaty of Friendship, Boundary, etc., October 27, 1795, Article XXI (Claims arising during the war between Spain and France); Denmark, Claims Convention, March 28, 1830; Peru, Claims Convention, January 12, 1863; Mexico, Claims Convention, July 4, 1868. [See Treaties and Conventions of the United States, etc.; see also argument of the United States, Orinoco Steamship Case, before the Hague Tribunal, page 117, note.] Article VII of the Prize Court Convention provides, that in the absence of any controlling treaty provisions or generally recognized rule of international law, "the court shall give judgment in accordance with the general principles of justice and equity," while Article VII of the Pecuniary Claims Convention with Great Britain signed August 18, 1910, makes it the duty of the members of the tribunal, upon assuming their functions, to take oath to decide, "in accordance with treaty rights and with the principles of international law and of equity."

these decisions, the Orinoco Steamship Case, was taken to the Hague Court for revision, the defense which the Venezuelan agent made of the umpire's decision was just exactly that, that under those words "absolute equity" the case was submitted to the unrestrained conscience of the arbitrator and that he could not possibly have transgressed any rules laid down in the protocol because he was not bound by any rules.

This position was repeatedly and strenuously urged by the Venezuelan representative. It was, as he said, his "capital argument," and that capital argument was negatived by the tribunal, which held that the words "absolute equity" could not be taken to excuse the arbitrator from applying the rules of international law and the rules prescribed by the protocol of submission and, because in the estimation of the Hague Court the umpire did not apply these rules, his decision was set aside.

No words are perfect; but for one hundred years the words "justice and equity" have been construed and their meaning settled at least to this extent, that they do not give unrestrained license or unrestricted liberty to depart from the ordinary rules of law. It is submitted that these words are as well seasoned as any words we are likely to find. In the realm of international law they have acquired a meaning through user in something of the same way, although not of course to the same degree, that, in our constitutional law, the phrase "due process of law" has taken on definition through long custom and many judicial decisions.

The precise words in the recent treaties were "law or equity" instead of "justice and equity" and if there is any distinction between the words "law" and "justice" the word "law" would seem to be clearly the more restrictive of the two. So I submit that it is reasonably well settled, settled as well as we can expect anything to be in the realm of international law, that these words, if adopted, would not give to the tribunal unrestricted license to disregard the known and accepted rules of law.

THE CHAIRMAN. Is there any further discussion? If not, we will proceed to the next paper, "The Codification of the Laws of Naval Warfare," by Rear Admiral Stockton.